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SUPREME COURT  
OF THE STATE OF WASHINGTON

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ROSS WILKINSON and CINDY WILKINSON, *et al.*,

Respondents,

v.

CHIWAWA COMMUNITIES ASSOCIATION,  
a Washington Non-Profit corporation,

Appellant.

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BRIEF OF APPELLANT

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A. INTRODUCTION

This appeal arises from an ongoing dispute between the plaintiffs who operate vacation rental businesses (“rental businesses”) in the Chiwawa River Pines community (“Chiwawa”) and the Chiwawa Communities Association (“Association”). The dispute involves the Association’s efforts to preserve Chiwawa’s single-family residential character, as established in the governing covenants, and to prevent the rental businesses from using homes in Chiwawa as short-term vacation rentals.

The 1988/1992 covenants governing Chiwawa generally restrict the use of properties in the community to single-family residential use and expressly ban commercial use of such properties. In *Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993) and *Metzner v. Wojdyla*, 125 Wn.2d 445, 451-53, 886 P.2d 154 (1994), this Court established a bright line rule that covenants can prohibit *any* commercial activity in a single-family residential subdivision. The trial court, following what it perceived to be Court of Appeals authority to the contrary, refused to apply this Court’s unambiguous precedent. This Court should reaffirm its adherence to the principle established in *Mains Farm* and *Metzner*. The 1988/1992 covenants prohibit the residential businesses’ activities.

Pursuant to the Association's authority as established in the 1988/1992 covenants, and in light of the increasing concerns of the Association's members over commercial rentals in Chiwawa, the Association's board submitted covenant amendments to the members that would fulfill the intent of the 1988/1992 covenants by restricting short-term transient rentals. A majority of the members voted overwhelmingly to approve those amendments in 2008 and again in 2011.

The trial court, however, refused to enforce these amendments, which were designed to preserve the single-family, non-commercial character of Chiwawa intended by the developer. This Court should defer to the board's decision based on principles of homeowner democracy, which is derived from state and case law. Homeowner association boards are elected, and function much like town councils do when addressing land use decisions that impact residential subdivisions. The 2011 amendments further prohibit the residential businesses' activities.

This case affects residential subdivisions and homeowners across Washington. Its impact is not confined to Chiwawa. Homeowners who purchased lots in a subdivision expecting families to occupy the homes there should not be subjected to the whims of a minority of the owners operating businesses renting to transient occupants, with the attendant

noise, traffic, and activities, that detract from the residential character of such neighborhoods.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error<sup>1</sup>

1. The trial court erred by entering an order on December 15, 2011 granting the rental businesses' summary judgment motion in its entirety and denying the Association's summary judgment motion in its entirety.

2. The trial court erred by entering an order on January 10, 2012 granting the rental businesses' motion to strike evidence that the Association offered on summary judgment.

(2) Issues Pertaining To Assignments of Error

1. After this Court's decisions in *Mains Farm* and *Metzner*, do short-term vacation rental homes where the rental owners pay B&O taxes on their businesses, the businesses are open to the public, and are operated for profit, violate covenants banning commercial uses and restricting the use of properties in the subdivision to single-family residential use? (Assignment of Error No. 1)

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<sup>1</sup> Copies of the challenged trial court decisions are in the Appendix.

2. Can a majority of homeowners acting through the homeowner association's elected board amend the governing covenants to prohibit short-term transient vacation rentals in a subdivision to implement the intent of its developer to create a peaceful, single-family residential community free from commercial activities? (Assignment of Error No. 1)

3. Were the comments compiled from a 2007 survey distributed by a homeowner association to its members admissible where the comments were relevant to document the members' concerns over the operation of commercial rental businesses in the subdivision? (Assignment of Error No. 2)

4. Was testimony from several homeowners concerning activities occurring in their subdivision admissible where it was based on their personal knowledge and their perceptions? (Assignment of Error No. 1)

C. STATEMENT OF THE CASE

Chiwawa is a planned residential community located in Chelan County near Leavenworth, Washington. CP 55, 90. The community consists of 367 lots and is zoned Rural Waterfront by the County. CP 134. It includes a mixture of owners in permanent residence and vacation owners. CP 134. All property owners in Chiwawa automatically become members of the Association and are subject to the obligations and duties

established in the governing articles, bylaws, covenants, and amendments.  
CP 29.

Pope & Talbot Development, Inc., ("Pope & Talbot") developed Chiwawa in six phases, starting in 1963. CP 3-4. It recorded a separate set of "Protective Restrictions and Covenants" for each phase. CP 4. In 1988, a majority of the Association's members approved the consolidation of the six sets of covenants into one set governing all phases ("1988 covenants"). CP 5, 29-32, 159, 163-71, 178.

The 1988 covenants restricted land use to single-family residential use and banned nuisances and offensive, commercial, and industrial uses:

4. Land Use. Lots shall be utilized solely for *single-family residential use* consisting of single residential dwelling [sic] and such out-buildings (garage, no more than one guest cottage, patio structure), *as consistent with permanent or recreational residence*.

.....  
5. Nuisances or Offensive Use. No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, *nor shall any lot be utilized for industrial or commercial use[.]*

CP 30 (emphasis added). Those covenants also expressly reserved the power of the members to change the covenants by a majority vote:

These covenants shall run with the land and shall be binding until 1998 (ten years), at which time said covenants shall be automatically extended for successive periods of ten years, unless the majority of the then owners of lots within the plat agree, by majority vote, to

change these protective restrictions and covenants in whole or in part.

CP 32. A majority of the Association's members later voted to adopt covenants ("1992 covenants") altering the 1988 covenants by eliminating guest cottages. CP 33-36.<sup>2</sup>

The Association's board has historically enforced the covenants to prevent the operation of lodging facilities and transient nightly rentals in Chiwawa. CP 180. For example, the board informed certain owners that they could not operate a bed and breakfast in their home. CP 180. In 1987, the board learned that an owner intended to rent his home on a daily basis. CP 180, 221, 992, 995. It promptly advised the owner in writing that daily rentals would violate the land use, nuisance, and offensive use provisions of the covenants. CP 180, 221. The owner responded that he had no intention of renting his home on a daily basis. CP 180, 223. In 1991, Gloria Fisk, then president of the board, asked an owner to remove her driveway sign advertising guest lodging because no businesses were allowed in the community under the covenants. CP 180. The minutes of a special meeting of the board memorialized the fact that Fisk informed the

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<sup>2</sup> The 1992 covenants were approved on September 28, 1991, but were not recorded until December 24, 1992. CP 33. Those changes, unchallenged by the rental businesses, only reinforce the view that single-family residences were intended in the community.

board of the problem and that she advised the owner that lodging was not permitted in the community. CP 226.

Despite the board's efforts to enforce the covenants, an increasing number of owners continued to use their properties for business purposes. The rental businesses, many of which were operated by real estate professionals, advertised their properties for rent on the Internet and with professional rental agencies. CP 134, 159, 247-49, 251-52, 284, 344-45, 364-65. They advertised in much the same way as a hotel or motel would advertise to the public, posting nightly or weekend rental rates online. CP 159-60, 247-49, 251-52, 284, 344-45, 364-65. On line, prospective customers could view photos of the rentals, calendars confirming availability, and check-in and check-out times. CP 160, 247-49, 251-52, 258, 284, 301. Many of the rental advertisements referenced the number of guests the homes could accommodate, regardless of the number of actual bedrooms available. CP 135. For example, the Hargises and the McLeans both advertised that their short-term vacation rentals could accommodate up to 10 guests or more. CP 301, 330. The Hargises advertised that their property could accommodate 2-14 guests and contained a hot tub that could accommodate 8 guests. CP 330.

The rental businesses operated their rentals like commercial businesses. CP 159-60. They solicited large groups of unrelated people

looking for short-term vacation lodging. CP 247-49, 251-52, 284, 344-45, 364-65. Guests paid a 10% lodging tax on the rental payments. CP 160. Many of the rental businesses provided cleaning services for a fee at the end of each rental term. CP 160, 249, 301, 331, 345, 353. Many of the rental businesses had tax identification numbers with the Department of Revenue and paid B&O taxes on the income their rentals generated, which was as high as \$35,000 in a single year. CP 422, 431, 1000-12. They operated under business names like Comfy Cabins and Lake Wenatchee Hideaways. CP 244, 247, 275, 284, 297, 313, 325, 341, 360, 418, 483.

Troubled by the increasing number of properties that appeared to be generating high volume, short-term vacation rentals in violation of the covenants and by the attendant noise, litter, drinking-related problems, and improper campfires that those rentals generated, the Association's board sent a survey to all of the members in November 2007 to assess their views on the use of properties in Chiwawa as nightly rentals and to determine if there was any interest in amending the 1988/1992 covenants to address such use. CP 96, 134-36, 1044. The Association received 116 responses; those responses favored ending nightly rentals with an exception for low-impact, service-oriented businesses. CP 136, 154-57.

The board scheduled a special meeting to coincide with its semi-annual meeting on September 27, 2008 to address the members' concerns.

CP 136. At this meeting, the members voted on whether to allow each of the following exceptions to the commercial use restrictions in the 1988/1992 covenants: (1) long-term, low-impact, service-oriented businesses; (2) long-term residential rentals (duration longer than six months); and (3) short-term rentals (duration shorter than six months). CP 136. Each member had one vote regardless of the number of lots owned. CP 206.

A majority of the members voted overwhelmingly to allow long-term residential rentals for a period of six months or more and to allow low-impact, service-oriented businesses. CP 136. But they voted against allowing short-term rentals of less than six months. *Id.* Paragraphs 4 and 5 of the 1992 covenants were amended (“2008 amendment”) to prohibit short-term rentals, which were defined as rentals of less than six months.<sup>3</sup> CP 452-53.

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<sup>3</sup> Paragraph 4 of the 1992 covenants entitled “Land Use” was renumbered and amended in its entirety as follows:

Lots shall be utilized solely for single family residential use consisting of single residential dwelling and such out-buildings (garage, patio structure), as consistent with permanent or recreational residence. Lots shall not be utilized for industrial or commercial EXCEPT for the following:

- (1) Long-term, low-impact service-oriented business: . . .

The rental businesses filed an action in the Chelan County Superior Court challenging the 2008 amendment. The trial court, the Honorable T. W. Small, concluded the amendment was invalid, but then rewrote it to confine the restriction on rentals to those of less than one month. CP 973-82, 986-87. The rental businesses appealed; Division III of the Court of Appeals held that the 2008 amendment was invalid as adopted by the Association, and could not be rewritten by the trial court. *Chiwawa Cmty. Ass'n v. Wilkinson*, 160 Wn. App. 1038 (2011). Although the Court of Appeals struck the new rental use restrictions, it retained the other amendments restricting the use of lots to single-family residential use and prohibiting nuisance or offensive uses. *Id.* at \*5. The Court did

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(2) Long-term residential rentals for a period of more than six (6) consecutive months: All residential rentals for a period of six (6) consecutive months or more shall be permitted, shall be in writing, subject to compliance with local zoning and permitting regulations, and subject to the Protective Covenants and By-laws.

All residential rentals for a period of less than six (6) consecutive months shall not be permitted.

CP at 452-53.

Paragraph 5 entitled "Nuisances or Offensive Use" was also renumbered and amended to read:

No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, nor shall any lot be utilized for industrial or commercial use (except as authorized under section 4, "Land Use"[]).

CP at 453.

not specifically address the question of whether the covenants could be amended to restrict short-term rentals of 30 days or less.

The Association's members continued to be concerned about vacation rental businesses operating in Chiwawa following the Court of Appeals' decision. The board held a special meeting on July 9, 2011 to address those concerns. CP 160. During that meeting, a majority of the members again voted to amend the covenants to explicitly prohibit short-term transient rentals ("2011 amendment"). CP 160-61, 173-76. Consistent with Judge Small's interpretation, the 2011 amendment defined "transient rentals" as rentals lasting less than one month or 30 continuous days. CP 175. The 2011 amendment states:

Rentals for less than one month or 30 continuous days if the rental period does not begin on the first day of the month ("transient use") shall be prohibited. The transient use of any lot for purposes such as vacation rentals, bed & breakfast, inn, motel, hotel, resort, or other transient lodging purposes, is inconsistent with the single-family residential purposes required by these Protective Covenants, is considered commercial use, and is thus specifically prohibited. Rentals for a duration of more than one month shall be permitted, shall be in writing, subject to compliance with local zoning and permitting regulations, and subject to the Protective Covenants and By-laws.

CP 175.

The rental businesses challenged the 2011 amendment in a declaratory judgment action filed in the Chelan County Superior Court.

CP 3-10. Both parties filed competing summary judgment motions. CP 88-122, 442-75. On December 15, 2011, the trial court, the Honorable John Bridges, granted the rental businesses' summary judgment motion and denied the Association's motion. CP 1093-95; RP I:35.<sup>4</sup> The Association filed an amended notice of appeal and sought direct review by this Court. CP 1091-95.

Subsequent to the filing of that notice, the rental businesses filed a motion with the trial court seeking attorney fees and costs under CR 11 and/or RCW 4.84.185. CP 1104-13. For the first time, they argued that the trial court's December 15th order was not final. CP 1106-07, 1109. The trial court initially believed that its December 15th order was not final and that the "single-family issue" remained to be tried. RP II:14-16.<sup>5</sup> The court determined the motion for fees was premature and denied it without prejudice, pending entry of a final order. CP 1310-12. The Association moved for reconsideration, CP 1313-20, 1350-53, and the trial court issued a memorandum decision granting the motion. CP 1366-71. The trial court vacated its February 16th order, reinstated its December 15th

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<sup>4</sup> "RP I" refers to the verbatim report of proceedings for the December 15, 2011 hearing.

<sup>5</sup> "RP II" refers to the verbatim report of proceedings for the January 31, 2012 hearing.

summary judgment order, and struck the July trial date in a formal order granting reconsideration. CP 1372-74.<sup>6</sup>

D. SUMMARY OF ARGUMENT

This Court has historically approved broad restrictions banning commercial activities in single-family residential subdivisions to preserve the residential character of such neighborhoods. The 1988/1992 covenants at issue here evidence Pope & Talbot's intent to create a quiet, single-family residential community: they explicitly ban commercial and other non-residential uses in Chiwawa, limiting use of properties in Chiwawa to single families. The rental businesses' commercial enterprises, which they operate for profit and offer to the public, are inconsistent with that intent.

Equally as important, the rental businesses do not rent to single families. Their business models, by design, involve soliciting large groups of admittedly unrelated people looking for short-term vacation lodging. The renters, as paying customers, do not constitute a "family" for purposes of the single-family land use restriction. In sum, the residential businesses violate the 1988/1992 covenants.

The 1988/1992 covenants expressly reserved to the majority of the Association's members the power to change the covenants. It is

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<sup>6</sup> This Court's Commissioner concluded in a ruling dated April 13, 2012 that the trial court had resolved all of the issues in this case and that its ruling constituted a final judgment. RAP 2.2(a).

undisputed that the Association followed the procedures established in those covenants when it adopted the 2011 amendment. The trial court's decision to invalidate the 2011 amendment supplants the Association's express authority to govern Chiwawa for the common good.

Amendments to covenants are permissible if they are adopted according to the procedures established in the covenants and are consistent with the general plan of development. Here, the 2011 amendment was properly adopted by a majority vote of the members. The only issue is whether the amendment was adopted in a reasonable and democratic manner and was consistent with Chiwawa's general plan of development. It was. The 2011 amendment modified the 1988/1992 covenants to expressly prohibit short-term vacation rentals. It addressed the length of the rental term, but did not change the underlying intent expressed by Pope & Talbot that Chiwawa function as a rural, single-family residential community. The amendment did not place any greater restrictions on the members than what was already present in the 1988/1992 covenants. The residential businesses violate the 2011 amendment to the covenants.

The trial court also erred by striking evidence and testimony the Association offered on summary judgment because both were admissible under the evidence rules. Comments on a 2007 survey sent to the members were relevant to the matters before the court and collecting the

data from the members would have been impractical given the number of survey responses received. In any event, the rental businesses did not produce any evidence that the compilation was inaccurate and did not object to it in the first lawsuit. The challenged testimony was admissible because it was based on the witnesses' personal knowledge and individual perceptions of the matters for which they testified.

E. ARGUMENT<sup>7</sup>

(1) The Rental Businesses' Short-Term Vacation Rentals Are Inconsistent With a Single-Family Residential Community and Violate the 1988/1992 Covenants

Residential covenants are designed to preserve the residential character of a neighborhood and to make the neighborhood more attractive for residential purposes. *Mains Farm*, 121 Wn.2d at 815. Public policy favors the enforcement of such covenants. *Riss v. Angel*, 131 Wn.2d 612, 623, 934 P.2d 669 (1997).

When interpreting a residential covenant, the Court's first task is to determine the drafter's intent. *Wimberly v. Caravello*, 136 Wn. App. 327,

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<sup>7</sup> This Court is well aware of the standard of review for summary judgments. This Court reviews them *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). Summary judgment is proper if the pleadings and supporting declarations show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Facts and reasonable inferences are construed in the light most favorable to the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). Here, the parties largely agreed on the material facts. But the Association, not the rental businesses, was entitled to judgment as a matter of law.

336, 149 P.3d 402 (2006).<sup>8</sup> Because covenants tend to enhance the value of the land, *Green v. Normandy Park, Riviera Section, Cmty. Club*, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003 (2008), this Court's goal is to interpret them to protect the homeowners' collective interests and to give effect to the purposes intended by the drafters to further the creation and maintenance of the planned community. *The Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 181, 810 P.2d 27, *review denied*, 117 Wn.2d 1013 (1991); *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 72 Wn. App. 139, 146, 864 P.2d 392 (1993), *aff'd*, 125 Wn.2d 337 (1994).

Basic rules of contract interpretation apply to the review of covenants. *Wimberly*, 136 Wn. App. at 336. *See also, Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999) (restrictive covenant and contract cases are treated the same). Under such rules, this Court must generally give the words in a covenant their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a

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<sup>8</sup> Washington courts have moved away from the position of strict construction historically adhered to when interpreting restrictive covenants. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005); *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 106, 267 P.3d 435 (2011). This is due in large part to a shift in perception regarding restrictive covenants. *Viking Props.*, 155 Wn.2d at 120. Instead of viewing covenants as restraints on the free use of land, the courts have acknowledged that restrictive covenants "tend to enhance, not inhibit, the efficient use of land." *Id.* (quoting *Riss*, 131 Wn.2d at 622).

contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

This Court has historically approved broad restrictions banning commercial activities in single-family residential subdivisions to preserve the residential character of the neighborhood. For example, this Court in *Mains Farm* enjoined an adult family home operated in a community with restrictive covenants requiring owners to utilize their properties for “single family residential purposes only.” 121 Wn.2d at 816. In deciding the case, the Court determined the home was not characteristic of a single-family residence because the members of the home were strangers prior to their arrival, they were not related to the defendant homeowner by birth, adoption, or marriage, and they were in need of 24-hour care. *Id.* at 818.<sup>9</sup> As the Court noted: “[t]he reasonable expectations of the other lot owners who bought their family homes in reliance on the long recorded covenants would not include a State-licensed, 24-hour operating business.” *Id.* at

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<sup>9</sup> Like Chelan County’s 1964 zoning code, most legal authorities define a “single family” as a housekeeping unit; a family is:

1. a group of persons connected by blood, by affinity, or by law, esp. within two or three generations.
2. A group consisting of parents and their children.
3. A group of persons who live together and have a shared commitment to a domestic relationship.

*Black's Law Dictionary* (7th ed. 1999). A “family” does not mean all those who live under one roof. *Matthews v. Penn-America Insurance Company*, 106 Wn. App. 745, 749, 25 P.3d 451 (2001), *review denied*, 145 Wn.2d 1019 (2002).

818-19. The Court concluded that the residential use restriction was violated by the intensity of the home's use: "[t]he single-family residential nature of defendant's use of her home is destroyed by the elements of commercialism and around-the-clock care that must be accorded to the unrelated persons who occupy her home." *Id.* at 821.

Similarly, this Court ruled in *Metzner* that the operation of a licensed child day care facility in a residential neighborhood violated a restrictive covenant limiting use of the property to "residential purposes only." 125 Wn.2d at 452-53. Like the state-licensed adult facility in *Mains Farm*, the child day care center in *Metzner* accepted money in exchange for the care of persons not related to them. The *Metzner* court confirmed the bright line rule prohibiting any commercial or business use of a property subject to a residential use restriction. *Id.* at 451.

*Mains Farms* and *Metzner* epitomize a long line of Washington cases upholding a court's exercise of its equitable powers to enjoin the breach of covenants. *See, e.g., Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 466, 194 P. 536 (1920) (noting "one whose deed contains a restriction clause has a right to enjoin another, whose deed has a similar restriction clause, from violating such restriction."); *Hagemann v. Worth*, 56 Wn. App. 85, 88, 782 P.2d 1072 (1989) (enjoining operation of elderly foster care home and observing that providing residence to paying

customers is not synonymous with a residential purpose); *Hollis*, 137 Wn.2d at 699 (holding mining and rock crushing business was not residential or incidental to residential use); *Wimberly*, *supra* (enjoining oversized garage that restricted view of neighbors).

Here, the 1988/1992 covenants evidence Pope & Talbot's intent to create a quiet, single-family residential community by explicitly banning commercial and requiring that properties be occupied on a single-family basis. CP 30, 33-36. The rental businesses' short-term vacation rentals are inconsistent with the residential character that Pope & Talbot intended to create for Chiwawa.

The rental businesses' short-term, transient vacation rentals for profit are a commercial or business use of the properties. This conclusion is in accord with both the common and legal meanings of the terms "commercial" and "business." "Commercial" is commonly defined as "viewed with regard to profit." *Merriam-Webster's Collegiate Dictionary* 249 (11th ed. 2003). "Commercial use" is defined in legal parlance as "a use that is connected with or furthers an ongoing profit-making activity." *Black's Law Dictionary* (9th ed. 2009). "Business" is commonly defined as a "particular field of endeavor" or "a commercial or sometimes an industrial enterprise" and "dealings or transactions esp. of an economic nature." *Merriam-Webster's Collegiate Dictionary* 167 (11th ed. 2003).

“Business” is defined in legal parlance as “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” *Black’s Law Dictionary* (9th ed. 2009).

The 1988/1992 covenants contained a strong and emphatic statement that the residential restrictions were intended to prohibit any type of commercial or business use of properties within Chiwawa. The rental businesses, through the operation of their transient vacation rentals, are providing a service to the public for which they are making a profit. The principal use of their properties is for conducting a commercial business akin to a hotel or a bed and breakfast. The rental businesses serve unrelated, paying customers. Those customers find the rentals on the Internet, are subjected to a credit or criminal background check, rarely meet the rental businesses, and pay to receive cleaning services at the conclusion of their stay. Clearly, this use of the rental businesses’ properties is a commercial or business use, as those terms are commonly and legally understood.<sup>10</sup> The rental businesses rent their properties to vacationers who are paying for the temporary use of the properties. This

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<sup>10</sup> It is of no consequence that, as the rental businesses asserted below, their rentals cause no more disruption than would a large family. The Association’s right to maintain the residential restriction is not affected by the extent of the damages the members may suffer for its violation.

is a business use clearly prohibited by the covenants. *Hagemann*, 56 Wn. App. at 914 (“to provide residence to paying customers is not synonymous with a residential purpose”). The trial court erred by ruling otherwise.

Equally as important, the rental businesses do not rent to single families. They *admittedly* do not restrict rental occupants to “single families.” CP 269-91, 292-307, 308-19, 320-35, 336-54, 355-67. They *admittedly* rent to unrelated people who do not share a residence outside of Chiwawa. Their business models, by design, involve soliciting large groups of unrelated occupants looking for short-term vacation lodging. The rental businesses’ renters are paying customers with a license to use the rental properties rather than tenants holding a residential lease. The renters do not constitute a “family” for purposes of the single-family land use restriction. *Hagemann*, 56 Wn. App. 92 n.4 (observing that “a number of unrelated persons residing together does not constitute a ‘family’ for the purpose of the declaration restriction to ‘single-family residences.’”). The trial court erred here by failing to rule that the rental businesses do not rent to single families, given their unequivocal admissions and the *Hagemann* court’s definition of a “single-family.”

Following this Court’s historical example, a use is either residential or commercial, but not both. If it operates like a business, it is a business. As the *Mains Farm* court observed, the intensity of the

property's use can change the character of its use. 121 Wn.2d at 821. Here, the rental businesses' use of their properties is clearly not for single-family residential purposes where the principal purpose of the use is to conduct a business similar to a hotel or a bed and breakfast. Under *Mains Farm*, the reasonable expectations of the other owners who bought into Chiwawa would not include being subjected to a constant turnover of commercially operated short-term vacation rentals. CP 180, 183.

The trial court also erred by relying on *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383, *review denied*, 166 Wn.2d 1012 (2009) to decide the single-family issue. *Ross* represents a significant departure from the bright line rule this Court established in *Mains Farm* and its progeny. Accordingly, this Court should overrule it. Even if the Court does not do so, the case is readily distinguishable.

In *Ross*, the lots were restricted to single-family residential use. The property owner rented his property four times in two years, generating \$1,150 in rental income. *Ross*, 148 Wn. App. at 44. On appeal, the Court of Appeals refused to conclude that the short-term vacation rental constituted a business use of residential property because the tenant's use of the property was no different than the owner's use.

When relying on *Ross*, the trial court here failed to make three important distinctions. First, the community in *Ross* had not amended its

covenants to explicitly prohibit short-term transient vacation rentals as was the case here. Second, the covenants applicable to Chiwawa were broader than those at issue in *Ross* because they explicitly prohibited nuisances and offensive, industrial, and commercial uses. These restrictions confirmed Pope & Talbot's intent to create a peaceful, rural, residential community for Chiwawa residents. More critically, the trial court ignored long-standing decisions from this Court approving expansive restrictions that prohibit commercial activities in single-family residential subdivisions to preserve the residential character of the neighborhood.

The trial court erred in failing to apply the 1988/1992 covenants to ban the residential businesses' commercial activities.

(2) The Association Had the Authority to Amend the Covenants to Preserve the Single-Family/No Business Restrictions and Appropriately Did So<sup>11</sup>

The trial court determined that the 1988/1992 covenants allowed vacation rentals of *any* duration, foreclosing *any* effort by the Association to change them. It thus invalidated the 2011 amendment in its entirety. The trial court's decision is erroneous because it supplants the Association's authority to govern the community for the common good.

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<sup>11</sup> The interpretation of language contained in a restrictive covenant is a question of law, which this Court reviews *de novo*. *Green*, 137 Wn. App. at 681.

That outcome conflicts with the recognized concept of homeowner democracy recognized by the Washington Legislature in RCW 64.38 *et seq.*, and ignores well-established case law permitting covenants to be amended.

Homeowner associations are called “the most representative and responsive form of democracy found in America today.” Kristin L. Davidson, *Bankruptcy Protection For Community Associations As Debtors*, 20 Emory Bankr. Dev. J. 583 (2004) (citation omitted) (“Davidson”). An association’s board of directors is typically elected by, and is responsible to, the membership of the association, much like an elected government council. Wayne S. Hyatt and James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 Wake Forest L.Rev. 915, 921 (1976) (“Hyatt/Rhoads”). But the residents retain a direct vote on any decision that affects their property interests. Davidson at 583. Given this infrastructure, the homeowner association plays a critical role as a representative of its individual members and performs two distinct functions: a managerial or service-oriented function and a quasi-government or regulatory function. *Terre du Lac Ass’n, Inc. v. Terre du Lac, Inc.*, 737 S.W.2d 206, 74 A.L.R.4th 141 (Mo. App. 1987). As a “mini-government” the association parallels in almost every instance the

powers, duties, and responsibilities of a municipal government. Hyatt/Rhoads at 918, 921; 76 Am. Jur. *Proof of Facts* 3d 89. See also, Paula A. Franzese and Steven Siegel, *Trust and Community: The Common Interest Community As Metaphor And Paradox*, 72 Mo. L. Rev. 1111, 1147 (2007) (noting homeowner associations have assumed many of the functions traditionally provided by local government, including the power to make and to enforce rules, and to permit or to deny certain uses of the community's property). These powers are vested in the association's board or other similar body clearly analogous to the governing body of a municipality. Hyatt/Rhoads at 918.<sup>12</sup>

The Washington Legislature recognized the broad authority vested in elected homeowner association boards to exercise a variety of powers in RCW 64.38 *et seq.* The statute *mandated* the election of homeowner association boards, RCW 64.38.030(2), and recognized broad powers to be exercised by those boards. RCW 64.38.020. Those statutory powers include "any other powers necessary and proper for the governance and operation of the association." RCW 64.38.020(14).<sup>13</sup> An association is

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<sup>12</sup> This Court has recognized that deference to elected bodies is appropriate with respect to land use decisions. *Phoenix Development, Inc. v. City of Woodinville*, 171 Wn.2d 820, 830, 256 P.3d 1150 (2011) (the courts grant "considerable deference" to a city's construction of its land use ordinances).

<sup>13</sup> RCW 64.38.020 provides, in part:

further empowered to act through its board by its governing documents, which include its articles of incorporation, bylaws, covenants, and rules. RCW 64.38.010(2).

This legislative policy is consistent with this Court's jurisprudence. In *Riss, supra*, for example, this Court concluded a homeowner's association board possessed the power to approve new construction and deny remodels of structures within a subdivision if such construction was inconsistent with the covenants and if the board acts reasonably and in good faith. 131 Wn.2d at 625, 628. As one commentator has noted, boards exercise significant functions including the levying and collection of assessments (akin to taxes), managing and maintaining common property, and enforcing the covenants. Casey Little, *Riss v. Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants*, 73 Wash. L. Rev. 433, 436-39 (1998).

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Unless otherwise provided in the governing documents, an association may:

- (1) Adopt and amend bylaws, rules, and regulations;
- (12) Exercise any other powers conferred by the bylaws;
- (13) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and
- (14) Exercise any other powers necessary and proper for the governance and operation of the association.

Washington has recognized that amendments to covenants are permissible. *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn. App. 267, 273, 883 P.2d 1387 (1994), *review denied*, 127 Wn.2d 1003 (1995) (holding that less than 100 percent of property owners within a subdivision may adopt new restrictions applicable to all owners if such power is expressly reserved and is exercised in a reasonable manner consistent with the general plan of the development). For an amendment to be valid, it must be adopted according to the procedures set up in the covenants and must be consistent with the general plan of development. *Id.* at 273-74. To determine whether an amendment is a reasonable exercise of power, the Court may look to the language of the covenants, their apparent import, and the surrounding facts. *Id.* Indeed, Washington courts have allowed covenant amendments to create a homeowners association. *Ebel v. Fairwood Park II Homeowners Ass'n*, 136 Wn. App. 787, 150 P.3d 1163 (2007) (opponents of amendment stopped to challenge it by their participation in the association's activities). *See also, Evergreen Highlands Ass'n v. West*, 73 P.3d 1 (Colo. 2003) (homeowners could add covenants to require all homeowners to be association members, and allow the association to assess mandatory dues to pay for common areas enforceable by liens on the property).

Here, the power to change the covenants was expressly reserved to the majority of homeowners in the 1988/1992 covenants:

. . . unless the majority of the then owners of lots within the plat agree, by majority vote, to change these protective restrictions and covenants in whole or in part.

CP 32. It is undisputed that the board followed the procedure established in the covenants, *i.e.*, the requisite majority of the members voted to approve the 2011 amendment banning short-term, transient vacation rentals. CP 32, 136:

The Association acted in a democratically representative and responsive manner when dealing with the issue. Its board was elected by, and was responsible to, the members. When confronted with an increasing number of short-term rental businesses in Chiwawa, the board took action to preserve the single-family residential character of the subdivision established in the covenants. It first surveyed the members to assess their views on the use of properties as short-term vacation rentals and to determine if there was any interest in amending the 1988/1992 covenants to address such use. CP 96, 134-36, 1044. Based on the survey results, the board formally submitted the issue to the members. A majority of the members then voted overwhelmingly to ban short-term vacation rentals and approved the 2011 amendment.

Despite the fact that the decision to ban short-term rentals was the members' decision to make, the trial court invalidated the 2011 amendment. This decision was erroneous because it abolished the authority expressly granted to the Association to govern Chiwawa and did not grant the Association the deference to which it was entitled as a "mini government" in making a residential land use decision.

The only issue, then, is whether the amendment was adopted in a reasonable manner and was consistent with Chiwawa's general plan of development. In deciding this issue, the trial court relied on *Meresse v. Stelma*, 100 Wn. App. 857, 999 P.2d 1267 (2000) to conclude that the Association was foreclosed from making *any* changes to the covenants at issue here. The trial court's reliance on *Meresse* was misguided. The case is distinguishable, or should be overruled by this Court.

In *Meresse*, the majority of development owners voted to override the minority owner, Meresse, and relocate a subdivision access road onto Meresse's property by characterizing the relocation as "road maintenance," "construction," or "repair," which did not require unanimous agreement under the covenants. *Id.* at 864. The trial court found that the majority's decision went beyond the original intent of a covenant for the "construction, maintenance and repair of the [road]." *Id.* at 863.

The Court of Appeals affirmed, holding that the relocation of the road was an unexpected expansion of Meresse's obligation to share in road maintenance because the language of the covenants "[did] not place a purchaser or owner on notice that he or she might be burdened, without assent, by road relocation at the majority's whim." *Id.* at 866-67. The minority homeowners in *Meresse* did not act in "a reasonable manner consistent with the general plan of the development." *Id.* at 865 (emphasis omitted) (quoting *Shafer*, 76 Wn. App. at 274).

Unlike the covenant at issue in *Meresse*, the 2011 amendment was consistent with Chiwawa's general plan of development as expressed in the 1988/1992 covenants. See *Shafer*, 76 Wn. App. at 273-74. The 1988/1992 covenants restricted land use to single-family residential use and prohibited commercial and industrial uses. The covenants also notified all property owners that they had to comply with those land use requirements or face legal action. The 2011 amendment simply modified the 1988/1992 covenants to expressly prohibit only short-term rentals of less than 30-days. The amendment goes to the length of the rental term, but does not change the underlying intent expressed in the covenants that Chiwawa function as a rural, single-family residential community.

Unlike the association in *Meresse*, the Association adopted the amendment here in a proper fashion. In *Meresse*, the Court of Appeals

determined that the association did not act reasonably or with due regard for the rights of the minority owners because the association attempted to evade the unanimity requirement by characterizing its action to relocate the subdivision's access road as "maintenance, repairs" or "additional construction on the road" – which did not require unanimous approval. By contrast, the Association here held a special meeting after notice to the members to address the use of properties in Chiwawa as short-term vacation rentals. Prior to the vote, the Association's board posted statements for and against transient rentals. CP 160. The rental businesses sent mailings in support of transient rentals and designated a representative to serve on the voting committee. CP 160. At the time of the vote, there were 305 owners in Chiwawa. A majority of the members, 177 out of 305, voted to amend the covenants to explicitly prohibit short-term, transient vacation rentals. Only 42 members voted in favor of allowing vacation rentals. CP 161.

Finally, the 2011 amendment was not unusually burdensome. It was merely a logical extension of the 1988/1992 covenants given the natural development and evolution of the community over time. It was a burden a reasonable Chiwawa purchaser would have expected given the ban on commercial and non-single family uses in place since the community was developed in the early 1960s. The 2011 amendment did

not place any more restrictions on the rental businesses than those previously stated.

More critically, the trial court's decision cannot be harmonized with this Court's decisions holding that homeowner associations in analogous property regimes may adopt provisions restricting the ability of owners to lease their properties given the benefit of owner-occupied units. *In Shorewood West Condominium Ass'n v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000), this Court recognized that property owners must give up a certain degree of freedom of choice which the owners might otherwise enjoy in separate, privately owned property.” 140 Wn.2d at 53. There, the condominium declaration barred rentals for less than a 30-day period. But the association board became concerned about depreciation in property values associated with high percentages of rental units in the condominium. The board obtained this information from realtors and financial institutions. The board then voted to amend the bylaws to ban all leases. This Court held the lease ban to be invalid because it was not accomplished by an amendment to the declaration, which required a supermajority vote of approval from the homeowners. Clearly, a 30-day restriction was proper and a complete leasing ban was possible if accomplished by amendment of the declaration.

That property owners reside in condominiums rather than single-family residences does not change the fact that rental businesses in both may be subject to restrictive covenants that may be amended. In fact, an air-space condominium consists of detached single-family residences on a single piece of property. The net result is indistinguishable from a single-family homeowner association except that the land is technically owed in common. CP 1191. There is no conceptual difference between the amendment procedure in a condominium association and the amendment procedure in a single-family homeowner association.<sup>14</sup>

The 2011 amendment was a reasonable exercise of the Association's grant of authority to make decisions affecting individual owners for the good of the community. The trial court erred by invalidating it.

(3) The Trial Court Erred by Excluding Evidence the Association Offered on Summary Judgment<sup>15</sup>

Prior to the summary judgment hearing, the rental businesses moved to strike some of the evidence the Association submitted on summary judgment. They first moved to strike the comments included in

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<sup>14</sup> See *Villas W. II of Willowridge Homeowners Ass'n, Inc. v. McGlothlin*, 885 N.E.2d 1274, 1279 (Ind. 2008), *cert. denied*, 555 U.S. 1213 (2009) (noting restrictive covenants function identically in planned subdivisions and condominiums).

<sup>15</sup> This Court reviews *de novo* the evidentiary rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301

the 2007 member survey attached to the declaration of former board president Mike Stanford, arguing the comments constituted inadmissible hearsay. CP 906-07. They subsequently moved to strike portions of the declarations of Judy Van Eyk, David Johnston, James Padden, and Gloria Fisk on a variety of grounds, including hearsay, irrelevance or immateriality, and lack of personal knowledge. CP 1070, 1077-80. They also moved to strike the declaration of Michelle Simpson in its entirety, arguing it was not proper rebuttal evidence. CP 1078-79.

The trial court refused to strike the declarations of Simpson and Johnston, but struck the comments section of the 2007 member survey and the rest of the contested testimony. CP 1101-02. The trial court struck Van Eyk's testimony relating to the assistance she provided to a prospective renter seeking a short-term rental in Chiwawa during the winter, Padden's testimony relating to Pope & Talbot's intentions when building the subdivision, his sense of the community and its expectations, the impact on the community from transient renters, and the renters' reasons for renting in Chiwawa, and Fisk's testimony that the enforcement action referenced in the rental businesses' response to the Association's summary judgment motion was the same type of activity at issue in this

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(1998) (*de novo* standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party on summary judgment).

lawsuit. CP 992, 1085-87, 1082-83, 1102. The trial court erred by excluding this evidence.

- a. The survey evidence was admissible because it was relevant to the Association's claims

Survey evidence is admissible in the appropriate case even if it is hearsay. *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 294, 505 P.2d 1291, cert. denied, 414 U.S. 975 (1973); 5C Karl B. Tegland, Wash. Prac., *Evidence Law and Practice* § 803.64 (5th ed.). In *Riblet*, the trial court admitted hearsay survey evidence because it was relevant to the issues, collecting the data from individual testimony was impractical, and it appeared trustworthy and reliable. 8 Wn. App. at 294. See also, *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1142 (9th Cir. 1997) (noting survey evidence is generally admissible if the survey is conducted according to accepted principles and is probative of an ultimate issue in a case).

The survey evidence here was admissible because it was a compilation of the members' comments on the questions the Association posed. It would have been difficult for the Association to present those comments by individual testimony given the number of property owners in Chiwawa who responded to the survey. Furthermore, the survey results and the comments were published without any apparent reason to falsify

them and were an accurate compilation of the information and the comments the board received. CP 1044. The rental businesses produced *no evidence* that the comments failed to accurately reflect the comments the board actually received. Moreover, this evidence was admitted in *Wilkinson* and the residential businesses did not object. CP 1044. The comments are relevant to the Association's contentions and should have been admitted. If anything, the rental businesses' objections cut against the weight of that evidence, not its admissibility. *Prudential Ins. Co. v. Gibraltar Fin. Corp.*, 694 F.2d 1150, 1156 (9th Cir. 1982), *cert. denied*, 463 U.S. 1208 (1983) ("Technical unreliability goes to the weight accorded a survey, not its admissibility."). The survey evidence should have been admitted.

- b. The contested testimony was admissible where it was based on the witnesses' personal knowledge and perceptions

The trial court also erred by excluding portions of the declarations of Van Eyk, Padden, and Fisk. Declarations submitted in support of a summary judgment motion must be made on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). Under ER 602 "[a] witness may not testify to a

matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” In addition, ER 701 requires opinion testimony by lay witnesses to be “rationally based on the perception of the witness[.]” The Association’s witnesses satisfied the evidence rules; thus, the trial court erred by excluding the challenged testimony.

Here, Van Eyk, a current board member, testified in the stricken portions of her declaration that she gave a prospective short-term renter the telephone numbers for Lake Wenatchee Hideaways, owned by the McCartys (property manager for the MacIndoes), and Comfy Cabins, owned by the Bethels. CP 1082-83. She had direct contact with the prospective renter and thus had personal knowledge of the matter on which she testified, making her testimony admissible. Moreover, she qualified her statement that the rental businesses made more money during the winter months with their weekend rentals than if they maintained a full time renter during the same period with the phrase “[i]t seems apparent[.]” CP 1083. Her testimony was rationally based on her perceptions of the matter on which she testified and was thus admissible.

Similarly, Padden testified in the stricken portions of his declaration that his family has lived in Chiwawa since 1968 and has owned properties there since 1969. He testified that the area of Chiwawa

where his family lived in 1968 contained only eight homes. CP 1099. He was intimately familiar with the community given his time there and thus had the necessary personal knowledge to testify about rentals in the community and to describe the community where he lived. His long-standing observations about the community bore directly on Pope & Talbot's intent when developing the subdivision because he has been a member of the community for nearly its entire existence. His testimony was admissible under the evidence rules.

Finally, Fisk's contested testimony specifically rebutted the rental businesses' characterization of the board's enforcement action against an owner who intended to rent his home on a daily basis. If anyone would have personal knowledge about the board's actions, it would be a past board president.

Where the contested testimony was based on the witnesses' personal knowledge and their perceptions of the matters on which they testified, the trial court erred by excluding that evidence when considering the summary judgment motions.

#### F. CONCLUSION

The 1988/1992 covenants bar the residential businesses' commercial, non-single family activities. Moreover, whether short-term, transient vacation rentals should be allowed in Chiwawa has been

extensively debated within the community for nearly 5 years. A majority of the Association's members democratically voted in 2011 to prohibit such business uses to preserve the rural, single-family residential character of the community created by Chiwawa's original grantor. Essentially the rental businesses argue that their right to financial gain supersedes what is best for the community. That is not true under Washington law.

The trial court erred by granting summary judgment to the rental businesses because their vacation rentals are for-profit businesses that are inconsistent with Chiwawa's single-family character. Their activities are prohibited by the express terms of the 1988/1992 covenants. The trial court also erred by invalidating the 2011 amendment because the amendment was properly adopted and was consistent with Chiwawa's general plan of development.

This Court should reverse the trial court's summary judgment order with directions to grant summary judgment and an award of fees to the Association; alternatively, the Court should reverse and remand this case for trial. Costs on appeal should be awarded to the Association.

DATED this 23~~0~~ day of May, 2012.

Respectfully submitted,



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Attorneys for Appellant

Chiwawa Communities Association

# APPENDIX

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SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

ROSS WILKINSON and CINDY WILKINSON;	) NO. 11-2-00678-1
MONTE KARNES and KIMBERLEY KARNES;	)
DAVID BETHEL and JEANIE BETHEL;	) ORDER ON PLAINTIFFS'
DARRELL McLEAN; JIM PAULUS and KATHY	) AND DEFENDANT'S
PAULUS; JOB HARGIS and LINDA HARGIS;	) MOTIONS FOR
DANIEL MacINDOE and ISIDRA MacINDOE;	) SUMMARY JUDGMENT
TED TREPANIER and RUBY AKINS-	)
TREPANIER,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CHIWAWA COMMUNITIES ASSOCIATION,	)
a Washington Non-Profit corporation,	)
	)
Defendant.	)

THIS MATTER having come before the Court on Defendant's Motion for Summary Judgment and on Plaintiffs' Motion for Summary Judgment and the Court having considered argument of counsel, the pleadings on file including the following:

1. Defendant's Motion for Summary Judgment;
2. Declaration of Yen Lam;
3. Declaration of Mike Stanford;

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ORDER ON PLAINTIFFS' AND  
DEFENDANT'S MOTIONS  
FOR SUMMARY JUDGMENT - 1

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- 4. Declaration of Joanne Stanford;
- 5. Declaration of Joanne Stanford;
- 6. Declaration of Gloria Fisk;
- 7. Declaration of Patty Blouin;
- 8. Plaintiffs' Motion for Summary Judgment;
- 9. Declaration of Dan and Isidra MacIndoe;
- 10. Joint Declaration of Plaintiffs;
- 11. Declaration of Dennis Jordan;
- 12. Plaintiff's Response to Defendant's Motion;
- 13. Declaration of Darlyn McCarty;
- 14. Declaration of Dennis Jordan;
- 15. Plaintiff's Motion to Strike;
- 16. Amended Declaration of Dennis Jordan;
- 17. Defendant's Response to Plaintiff's Motion to Strike;
- 18. Defendant's Response to Plaintiffs' Motion for Summary Judgment;
- 19. Second Declaration of Gloria Fisk
- 20. Second Declaration of Yen Lam;
- 21. Declaration of Judy Van Eyk;
- 22. Declaration of David Johnston;
- 23. Second Declaration of Mike Stanford;
- 24. Declaration of Michael Standley;
- 25. Declaration of Michelle Simpson;
- 26. Declaration of James Padden;
- 27. Plaintiffs' Reply to Defendant's Response to Motion for Summary Judgment;
- 28. Plaintiffs' Supplemental Motion to Strike Testimony
- 29. *Defendant's Response to Plaintiffs' Supplemental Motion*

The Court having considered the foregoing and the argument of counsel, NOW,

THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

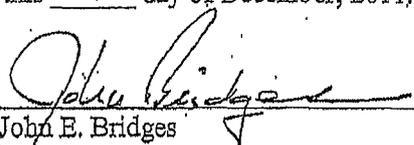
1. DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT IS DENIED  
IN ITS ENTIRETY.

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 ORDER ON PLAINTIFFS' AND  
 DEFENDANT'S MOTIONS  
 FOR SUMMARY JUDGMENT - 2

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2. PLAINTIFFS' MOTION FOR  
SUMMARY IS GRANTED IN ITS  
ENTIRETY

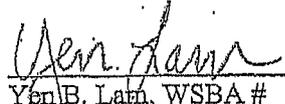
DONE IN OPEN COURT on this 15 day of December, 2011.

  
\_\_\_\_\_  
John E. Bridges  
Superior Court Judge

PRESENTED BY:

  
\_\_\_\_\_  
Dennis Jordan, WSBA #4904  
Attorney for Plaintiffs

COPY RECEIVED, APPROVED FOR  
ENTRY:

  
\_\_\_\_\_  
Yen B. Lam, WSBA #  
Attorney for Defendant

||  
ORDER ON PLAINTIFFS' AND  
DEFENDANT'S MOTIONS  
FOR SUMMARY JUDGMENT - 3

Dennis Jordan & Associates Inc. P.S.  
4218 Rucker Avenue Everett, WA 98203  
(425)252-5554 (425)258-4060 Fax

FILED

JAN 10 2012

Roni Morrison  
Chelan County Clerk

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SUPERIOR COURT OF WASHINGTON FOR CHELAN COUNTY

ROSS WILKINSON and CINDY WILKINSON;	) NO. 11-2-00678-1
MONTE KARNES and KIMBERLEY KARNES;	)
DAVID BETHEL and JEANIE BETHEL;	) ORDER ON PLAINTIFFS'
DARRELL McLEAN; JIM PAULUS and KATHY	) MOTION TO STRIKE
PAULUS; JOE HARGIS and LINDA HARGIS;	) STRIKE TESTIMONY
DANIEL MacINDOE and ISIDRA MacINDOE;	)
TED TREPANIER and RUBY AKINS-	)
TREPANIER,	)
	)
Plaintiffs,	)
	)
vs.	)
	)
CHIWAWA COMMUNITIES ASSOCIATION,	)
a Washington Non-Profit corporation,	)
	)
Defendant.	)

THIS MATTER having come on regularly before the undersigned Judge and the Court having considered the pleadings on file in support of and in opposition to Plaintiffs' and Defendant's respective Motions for Summary Judgment as set forth in the Order on Summary Judgment on file herein as well as the Plaintiffs' Motion and Supplemental Motion to Strike and the Defendant's Responses thereto, NOW, THEREFORE,

\\  
ORDER ON PLAINTIFFS' MOTION  
TO STRIKE TESTIMONY - 1

Dennis Jordan & Associates Inc. P.S.  
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IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. The following testimony that has been objected to by the Plaintiffs shall be and hereby is stricken from consideration in support of Defendant's motion for Summary Judgment:

(1) To the extent objected to, the 2007 survey results attached to the Declaration of Mike Stanford as Exhibit C that refers to members "Comments";

(2) To the extent objected to, the testimony of Gloria Fisk as set forth in her Second Declaration;

(3) To the extent objected to, the testimony of Judy Van Eyk; and,

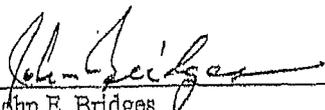
(4) To the extent objected to, the Declaration testimony of James Padden.

2. The remaining objections of the Plaintiffs to certain of the testimony objected to shall be and hereby is denied, to wit:

(1) the Declaration testimony of Michelle Simpson; and,

(2) the Declaration testimony of David Johnston.

DONE IN OPEN COURT on this 10 day of ~~December~~ <sup>January</sup>, ~~2011~~ <sup>2012</sup>.

  
\_\_\_\_\_  
John E. Bridges  
Superior Court Judge

\\  
ORDER ON PLAINTIFFS' MOTION  
TO STRIKE TESTIMONY - 2

Dennis Jordan & Associates Inc. P.S.  
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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Appellant in Supreme Court Cause No. 86870-1 to the following parties:

Yen Lam  
Galvin Realty Law Group, P.S.  
6100 219<sup>th</sup> Street SW, Suite 560  
Mount Lake Terrace, WA 98043

Dennis Jordan  
Dennis Jordan & Associates, Inc. P.S.  
4218 Rucker Avenue  
Everett, WA 98203

Original efiled with:

Washington Supreme Court  
Clerk's Office  
415 12<sup>th</sup> Street W.  
Olympia, WA 98504

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of May, 2012, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick